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JUN 5 1987

MEMORANDUM

TO: Water Supply and Pollution Control Members

FROM: George Dana Bisbee *gdb*

DATE: April 8, 1987

SUBJECT: APPEAL OF THE CITY OF MANCHESTER REGARDING DENIAL OF
DISCHARGE PERMIT FOR DOCKSIDE II CONDOMINIUMS

On the agenda for your meeting of April 8, 1987 is a 10 AM appeal by the City of Manchester of the Water Supply and Pollution Control Division's (Division) denial of discharge permit for Dockside II Condominiums. Inasmuch as the Water Supply and Pollution Control Council (Council) is now called upon to hear an appeal of a case it had initially heard back on January 14, 1987 (which formed the basis of a recommendation to the Division), this raises the very issue that I discussed with you at your meeting on March 11, 1987--namely, the procedures that should now be followed by the Council in carrying out its function of hearing appeals of permitting decisions made by the Division.

RSA Chapter 21-O now provides that the Division is to issue permits, and the Council is to hear any appeals taken from the permitting decisions made by the Division. RSA 21-O:6, RSA 21-O:7, IV. This is a change from the prior law, which provided that the then existing Water Supply and Pollution Control Commission made all the initial surface water discharge permitting decisions. RSA 149:8, III(a). While there was a process for complaining parties to file motions for rehearing to the Commission, there was no provision in the then existing law for appeals to be taken separately to another administrative body. All appeals from Commission decisions went to the Supreme Court. Under the present law, there is a specific provision for administrative appeals, taken from decisions of the Division to the Council. RSA 21-O:7, IV. Appeals to the Supreme Court are still available from the decisions on appeal of the Council. RSA 21-O:14, III.



Because the Council now has the discrete role of hearing appeals from Division decisions, we have advised you that it is no longer appropriate for you as a Council to conduct hearings and make recommendations on initial permitting decisions. This advice emanates from the fundamental principle of administrative law that those governmental officials acting in a quasi-judicial capacity must decide matters before them with impartiality. Sandborn v. Fellows, 22 N.H. 473, 481 (1851) ("[A]ll persons who act as judges should be impartial..."). From this general principle stems the more specific tenet of administrative law that a "judge or board member must not have a bias or prejudgment concerning issues of fact in a particular controversy". New Hampshire Milk Dealers Association v. New Hampshire Milk Control Board, 107 N.H. 335, 339 (1966) (emphasis added); see Appeal of Lathrop, 122 N.H. 262, 265-6 (1982); see also Davis, Administrative Law Treatise, Section 19:4 at 382 (1980). By conducting a hearing and making recommendations on a particular permitting decision you would essentially be making a determination of the facts of a given case. We have advised you, therefore, that it would not be appropriate for you to continue with that practice. Rather, you should refrain from involvement with the facts of a given permitting decision prior to your hearing an appeal that may be taken from such a decision.

This is not to say, however, that you should avoid permitting issues, and even facts pertaining to any given permit application. In carrying out your statutory responsibility to consult with and advise with the Division with respect to the "policy, programs, goals and operations" of the Division (RSA 210:7, III), you will by necessity have to (and want to) involve yourself with all of the important issues involved in permitting matters, as well as other issues before the Division. Of course, you will also have to conduct hearings on any appeals brought before you on permitting decisions of the Division. The thrust of our advice in this memorandum is simply that you should not conduct evidentiary hearings on actual pending permit applications, and make recommendations to the Division based on those hearings.

In the case of the appeal of the City of Manchester with respect to the Dockside II Condominiums you confront a unique problem caused by your already having conducted a hearing and made a recommendation to the Division to deny the permit application. You are now called upon to hear and decide the appeal on that very permit application. Because you are the only administrative body authorized to hear this appeal, however, it is necessary for you to proceed with this case and rule on the appeal. See Appeal of Lathrop, 122 N.H. 264, 266. (In a similar situation, the Supreme Court held that because the Water Resources Board was the only state body with the power to

decide the case, the "rule of necessity" would apply and the Water Resources Board could hear the appeal). You must do so, of course, in accordance with the procedures prescribed by law for such appeals. RSA 541-A:16-22.

You must also rule on this case impartially. Your statutory obligation with respect to this appeal is to form a conclusion on the basis of the facts presented to you during the hearing on appeal. Because you have already conducted a hearing on the application now before you on appeal, each member must determine for himself whether he can fairly and impartially hear the evidence on appeal, and reach a conclusion based on that evidence. I would respectfully request, therefore, that each member consider whether he has been so influenced by the prior hearing that he feels he could not reach a different conclusion if the evidence presented at the hearing on appeal so warranted.

I hope this memorandum has been helpful. I will be in attendance at your meeting on April 8, 1987, and will be prepared to discuss this further with you then.

GDB/syf
cc: Alden H. Howard
William A. Healy